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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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GREENBERG TRAURIG, LLP  
MET LIFE BUILDING  
200 PARK AVENUE  
NEW YORK, NY 10166

EXAMINER
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FERTIG, BRIAN E

ART UNIT	PAPER NUMBER
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3694

NOTIFICATION DATE	DELIVERY MODE
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02/26/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

SchindlerB@gtlaw.com  
LucasCh@gtlaw.com  
NYIPmail@gtlaw.com

<i>Office Action Summary</i>	Application No.	Applicant(s)	
	10/615,250	TSO ET AL.	
	Examiner	Art Unit	
	BRIAN FERTIG	3694	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 08 December 2008.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1,2,4-6,8,9,11-16,19,21-24,36 and 37 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4-6, 8-9, 11-16, 19, 21-24 and 36-37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### DETAILED ACTION

This action is in response to Applicant's filing of 12/8/2008. Claims 1, 2, 4-6, 8-9, 11-16, 19, 21-24 and 36-37 are pending and examined below.

#### *Claim Rejections - 35 USC § 112*

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1, 2, 4-6, 8-9, 11-16, 19, 21-24 and 36-37 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

#### With respect to claims 1 and 15

Claims 1 and 15 provides for “using the sale of the trust certificate to the first entity, combined with the purchase of the equity security by the trust and the purchase of the put option by the trust, so as to provide the first entity with principal protection exposure to the equity market without causing substantial income statement volatility”, but does not set forth any steps involved in the method/process for doing so. It is unclear what method/process applicant is intending to encompass with this ‘use’ recitation. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced. The Examiner respectfully suggests positive recitations directed to the steps involved in effecting this limitation.

#### With respect to claims 2 and 16

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These claims recite an intended result, but provide no positive steps for accomplishing this result and are, therefore, indefinite since they merely recites an intended result without any active, positive steps delimiting how this result is actually accomplished.

With respect to claims 4-6, 8-9, 11-15, 19, 21-24 and 36-27

These claims are rejected for incorporating the subject matter rejected above.

*Claim Rejections - 35 USC § 103*

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. Claims 1-2, 4-6, 8, 11-16, 21-24 and 36-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Securities Act File No. 333-83085 filed by The Market Participation Principal Protection Fund Inc, July 16, 1999 (SEC) (as annotated by

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examiner) in view of Hecht v. Malley, 265 U.S. 144 (1924)] (Hecht) and US Patent Application Publication 2002/0138391 A1 to Brown, filed Mar 21, 2001 (Brown) and Trudy Ring's Article Abstract 'European' Settlement draws Funds' Interest, published in Pension & Investment Age, May 12, 1986, vol 14, Iss 10, pg 41-42, retrieved from Proquest 7/2/2008 (Ring)

With respect to claim 1

SEC teaches:

A computer implementable method comprising the steps of:

allocating, a portion of the proceeds of the sale of the trust certificate to a purchase of an equity security ("With the remaining proceeds, the Fund will invest in a portfolio that will match as closely as practicable the composition and proportions of the S&P 500 Index.", See Investment Objectives and Policies at Examiner's Annotation (EA) 2);

purchasing the equity security with the allocated portion of the proceeds of the sale of the trust certificate, wherein the purchase is made by the trust from an equity market ("With the remaining proceeds, the Fund will invest in a portfolio that will match as closely as practicable the composition and proportions of the S&P 500 Index.", See Investment Objectives and Policies at Examiner's Annotation (EA) 2);

allocating, a portion of the proceeds of the sale of the trust certificate to a purchase of a put option on the equity security ("With the proceeds of this offering, the Fund intends to purchase one or more Put

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Contracts related to the S&P 500”, See Investment Objectives and Policies at EA 2);

purchasing the put option with the allocated portion of the proceeds of the sale of the trust certificate, wherein the purchase is made by the trust from a second entity (“With the proceeds of this offering, the Fund intends to purchase one or more Put Contracts related to the S&P 500”, See Investment Objectives and Policies at EA 2);

using the sale of the trust certificate to the first entity, combined with the purchase of the equity security by the trust and the purchase of the put option by the trust, so as to provide the first entity with principal protection exposure to the equity market (“The investment objective of the Fund is to return to shareholders on or about the Marturity date . . . the Fund’s initial net value”, See Investment Objectives and Policies at EA 1)

SEC does not explicitly teach:

selling a trust certificate to generate proceeds, wherein the sale is from a trust to a first entity;

with a computer,

without causing substantial income statement volatility;

wherein the trust includes a requirement that the equity security be sold on a date that the put option expires.

Hecht teaches:

selling a trust certificate to generate proceeds, wherein the sale is from a trust to a first entity in so far as Hecht teaches conducting the sale of a trust certificate and the use of a trust as investment entity. Particularly, Hecht teaches that a business trust “is a form of business organization . . . consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates (i.e. trust certificates) issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred (i.e. sold) in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.”

Brown teaches:

without causing substantial income statement volatility in so far as Brown teaches principal protection without substantial income statement volatility via “hedge accounting rules” (See par. 43).

with a computer (See par 44-46, note that the use of computers is well known in the art and, as such, there is no technological advance over the allocating features taught by SEC above in light of Brown, See the discussion of *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 82 USPQ2d 1687 (Fed. Cir. 2007) in MPEP § 2143 and the

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discussion of *In re Venner*, 262 F.2d 91, 95, 120 USPQ 193, 194 (CCPA 1958) in MPEP § 2144),

Ring:

wherein the trust includes a requirement that the equity security be sold on a date that the put option expires (see Abstract, note that European settlement is attractive for portfolio insurance programs which are analagous to Applicant's invnetion. Note that this style of option can only be executed at expiration of the put. As such, a provision for the sale of the underlying equity is suggested in so far as not doing so would defeat the insurance feature of hedge created with the put.).

It would have been obvious to one having ordinary skill in the art at the time of Applicant's invention to have provided SEC with the certificate sale feature of Hecht in order to divide the beneficial interest in the property as taught explicitly by Hecht.

It would have been further obvious to one having ordinary skill in the art at the time of Applicant's invention to have provided SEC with the income statement volatility reduction features of Brown, in order to benefit from "hedge accounting" as taught explicitly by Brown. It would also have been obvious to one having ordinary skill in the art at the time of Applicant's invention to have provided the computing features of Brown since application of current technology to perform known methods has been found to be an obvious improvement by the courts in both *Leapfrog* and *Venner*.

Finally, it would have been further obvious to have provided SEC with the European style settling put features of Ring in order to provide portfolio insurance



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as taught explicitly by Ring.

With respect to claim 2

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 1 (see rejection of claim 1 above), wherein the principal protection exposure is provided to the first entity with substantially no income statement volatility (See Brown par 43).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 4

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 1 (see rejection of claim 1 above), wherein substantially all of the proceeds of the sale of the trust certificate are allocated between the purchase of the equity security and the purchase of the put option on the equity security (“With the proceeds of this offering, the Fund intends to purchase one or more Put Contracts . . . With the remaining proceeds, the Fund will invest in a portfolio . . . of the S&P 500”, See SEC at EA 2).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 5

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 1 (see rejection of claim 1 above), further comprising structuring the trust (a trust is “a form of business organization . . . whereby property is conveyed to trustees, in accordance with the terms of an interest of trust, See Hecht).

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(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 6

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 5 (see rejection of claim 5 above), wherein substantially all of the proceeds of the sale of the trust certificate are allocated among the purchase of the equity security, the purchase of the put option on the equity security, and formation and administration costs associated with the trust (“With the proceeds of this offering, the Fund intends to purchase one or more Put Contracts . . . With the remaining proceeds, the Fund will invest in a portfolio . . . of the S&P 500”, See SEC at EA 2 and “The Fund will pay the fees and expenses of non-affiliated Directors and their counsel, brokerage and transaction costs”, See SEC, Fees at EA 4. Note that these operational expenses could occur during the trust formation and would necessarily have to be paid from the proceeds gathered through the initial sale of certificates since the Fund would have no other assets at that point.).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 8

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 1 (see rejection of claim 7 above), further comprising selecting a trustee for the trust (“a trust is “a form of business organization . . . whereby property is conveyed to trustees”, See Hecht. Note: it is inherent that a trustee be chosen if a trust is to exist.)

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(see rationale supporting obviousness and motivation to combine of claim 1 above)

With Respect to claim 11

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 1 (see rejection of claim 1 above), wherein the put option is struck at a price that substantially guarantees at least the return of the initial investment by the first entity at the maturity of the put option (“However, as the Fund will use a portion of its assets to purchase one or more Put Contracts, the Fund’s return on the Maturity Date is expected to exceed the performance of the S&P 500 if the value of the S&P 500 on the Maturity Date is less than its Starting Value”, See SEC, Investment Objectives and Policies at EA 2, see also the portfolio insurance teaching of Ring).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 12

SEC in view of Hecht, Brown, and Ring teaches:

method of claim 11 (see rejection of claim 11 above), wherein the put option is an over-the-counter put option (“Put contracts that are not traded on an organized exchange are known as an “over-the-counter” or “OTC” instrument. The Put Contract that the Fund intends to purchase will differ from exchange traded financial contracts”, See SEC, at Investment Objectives and Policies at EA 3).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 13

SEC in view of Hecht, Brown, and Ring teaches:

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the method of claim 12 (see rejection of claim 12 above), wherein the put option is a European-style cash-settling option (“However, as the Fund will use a portion of its assets to purchase one or more Put Contracts, the Fund’s return on the Maturity Date is expected to exceed the performance of the S&P 500 if the value of the S&P 500 on the Maturity Date is less than its Starting Value.” Because European-style cash-settling options are settled on a particular maturity date and because they are one of only a limited number of popular settlement terms, the disclosure of SEC contemplates their use, See SEC at EA 2, See also Ring.).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 14

SEC in view of Hecht, Brown, and Ring teaches:

the method of claim 1 (see rejection of claim 1 above), wherein the steps are carried out in the order recited. (Note that SEC as modified by Hecht and Brown recites acquisition of the put option before the acquisition of the security. These steps could be reversed without materially changing the result of the method.)

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 15

SEC in view of Hecht, Brown, and Ring teaches:

A computer implementable method, comprising the steps of:

structuring a trust (a trust is “a form of business organization . . .

whereby property is conveyed to trustees, in accordance with the terms of an interest of trust, See Hecht);

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selecting a trustee for the trust (“a trust is “a form of business organization . . . whereby property is conveyed to trustees”, See Hecht.

Note: it is inherent that a trustee be chosen if a trust is to exist.);

selling a trust certificate to generate proceeds, wherein the sale is from the trust to a first entity (“These certificates, which resemble certificates for shares of stock . . . are issues and transferred in line manner”, see Hecht. Note that stock is routinely issued to generate proceeds);

allocating, with a computer, a portion of the proceeds of the sale of the trust certificate to a purchase of an equity security (“With the remaining proceeds, the Fund will invest in a portfolio that will match as closely as practicable the composition and proportions of the S&P 500 Index.”, See SEC at EA 2, in combination with the computers taught by Brown, par 44-46);

purchasing the equity security with the allocated portion of the proceeds of the sale of the trust certificate, wherein the purchase is made by the trust from an equity market (“With the remaining proceeds, the Fund will invest in a portfolio that will match as closely as practicable the composition and proportions of the S&P 500 Index.”, See SEC at EA 2);

allocating, with a computer, a portion of the proceeds of the sale of the trust certificate to a purchase of a put option on the equity security (“With the proceeds of this offering, the Fund intends to purchase one or

more Put Contracts related to the S&P 500”, See SEC at EA 2, in combination with the computers taught by Brown, par 44-46); and

purchasing the put option with the allocated portion of the proceeds of the sale of the trust certificate, wherein the purchase is made by the trust from a second entity (“With the proceeds of this offering, the Fund intends to purchase one or more Put Contracts related to the S&P 500”, See SEC at EA 2);

wherein substantially all of the proceeds of the sale of the trust certificate are allocated among the purchase of the equity security, the purchase of the put option on the equity security, and formation and administration costs associated with the trust (“With the proceeds of this offering, the Fund intends to purchase one or more Put Contracts . . . With the remaining proceeds, the Fund will invest in a portfolio . . . of the S&P 500”, See SEC at EA 2 and “The Fund will pay the fees and expenses of non-affiliated Directors and their counsel, brokerage and transaction costs”, See SEC, Fees at EA 4. Note that these operational expenses could occur during the trust formation and would necessarily have to be paid from the proceeds gathered through the initial sale of certificates since the Fund would have no other assets at that point.);

wherein the sale of the trust certificate to the first entity, combined with the purchase of the equity security by the trust and the purchase of the put option by the trust, provide the first entity with principal protection

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exposure to the equity market ("The investment objective of the Fund is to return to shareholders on or about the Maturity date . . . the Fund's initial net value", See SEC at EA 1) without causing substantial income statement volatility (See Brown par. 43); and

wherein the trust includes a requirement that the equity security be sold on a date that the put option expires (see Ring Abstract, note that European settlement is attractive for portfolio insurance programs which are analogous to Applicant's invention. Note that this style of option can only be executed at expiration of the put. As such, a provision for the sale of the underlying equity is suggested in so far as not doing so would defeat the insurance feature the put provides.).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 16

See rationale supporting the rejection of claim 2 above.

With respect to claim 21

See rationale supporting the rejection of claim 11 above.

With respect to claim 22

See rationale supporting the rejection of claim 12 above.

With respect to claim 23

See rationale supporting the rejection of claim 13 above.

With respect to claim 24

See rationale supporting the rejection of claim 14 above.

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With respect to claim 36

SEC in view of Hecht, Brown, and Ring teaches:

The method of claim 1 (see rejection of claim 1 above), wherein a third entity owns a blocking piece of the trust such that the trust could not be unilaterally dissolved or amended by the first entity (see SEC "Certain Provisions of the Articles of Incorporation and By-Laws, note that no individual first party can *unilaterally* cause a merger, sale of liquidation of all assets since at least 66% of the shares of voting stock must be in agreement. The third-parties holding the blocking piece are the other voting shareholders. These are third-parties in so far as they were not a party to the sale of certificates to the individual investor).

(see rationale supporting obviousness and motivation to combine of claim 1 above)

With respect to claim 37

See rationale supporting the rejection of claim 36 above.

6. Claims 9 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over SEC in view of Hecht, Brown, Ring, and US Patent 5,809,484 to Mottola, 1998 (Mottola).

With respect to claim 9

The teachings of SEC as modified by Hecht, Brown, and Ring are described above. They do not teach selecting an independent bank trustee to serve as trustee for the trust. SEC as modified by Hecht, Brown, Mazie, and Mottola teaches the method of claim 7(see rejection of claim 7 above), further comprising selecting an independent



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bank trustee to serve as trustee for the trust (See Mottola col 3, lines 47-51). Because Mottola teaches that it is known in the art to select an independent bank as the trustee of a trust, it would have been obvious to one skilled in the art at the time of applicant's invention to select the trustee of Hecht to be an independent bank as taught by Mottola.

With respect to claim 19

See rationale supporting the rejection of claim 9 above.

*Response to Arguments*

7. Applicant's arguments filed 12/8/2208 have been fully considered but they are not persuasive. With respect to Applicant's argument that Ring fails to suggest the limitation "wherein the trust includes a requirement that the equity security be sold on a date that the put option expires", the Examiner respectfully disagrees. Ring teaches, "options with European-style settlement are attractive, especially for use in portfolio insurance programs", for example, in a hedge. Ring further teaches that European-style put options can only be exercised on the expiration date. These combined teachings fairly suggest a provision in the trust that requires that the security be sold on the date the put option expires since this is the only chance that the insurance created by the hedge can be realized. Selling the security before the expiration would mean that the put option could not be executed and if the market value of the equity security had decreased in value to the extent that its value was below the value of the principal protected, the European style put option could not be executed so as to compel the sale of the security at a favorable price, thus defeating the insurance and frustrating

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investments purpose for providing insurance. Similarly, if the equity security was held or sold after the expiration date of the put option, the put option also could no longer be exercised, again frustrating investments purpose for providing insurance

8. The Examiner also respectfully observes that the limitation directed to “wherein the trust includes a requirement that the equity security be sold on a date that the put option expires”, as claimed, is non-functional descriptive material in so far as they are contractual provisions. The claim does not recite these provisions as being executable by the computer. As such, the Examiner respectfully suggests, to the extent supported by Applicant’s Specification, amending the claim language to affirmatively recite a processing step of selling the equity security on the date the put option expires, or otherwise claim this limitation with respect to the processing of the computer instead of as a feature of the trust.

### *Conclusion*

9. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US Patent Application Publication 2002/0059123 for Dunning teaches a system and method directed toward providing an investment vehicle while protecting their principal investments. As Applicant considers the response to this Office action, the Examiner respectfully urges Applicant to consider the teaching of this reference in combination with the art cited above.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to BRIAN FERTIG whose telephone number is (571) 270-

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5131. The examiner can normally be reached M-F 9am-5pm EST. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, James Trammell can be reached on 571-272-6712. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/B.F./

/Mary Cheung/  
Primary Examiner, Art Unit 3694